BURSA MALAYSIA SECURITIES BHD v. MOHD AFRIZAN HUSAIN

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
ABU BAKAR JAIS JCA
GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: W-02(A)-696-06-2020]
2 JULY 2021

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Quashing decisions of Bursa Malaysia Securities Berhad ('Bursa Malaysia') Listing Committee ('LC') and Appeals Committee ('AC') – Appeal against – Duties of liquidator – Whether breached – Whether liquidator of listed corporation bound to comply with ACE Market Listing Requirements ('ACE LR') – Whether liquidator expected to continue making quarterly announcements when public listed company ceased operations – Whether mandatory for Bursa Malaysia to de-list wound up listed corporation – Construction to be accorded to r. 16.11(2) of ACE LR – 'may de-list' and 'shall de-list' – Where word 'shall' is employed – Literal and strict interpretation – Adoption of – Whether Bursa Malaysia could not exercise any discretion except to de-list listed corporation upon a winding up order – Whether decisions of LC and AC tainted with illegality and amenable to judicial review – Capital Markets and Services Act 2007, s. 11 – Companies Act 2016, ss. 477, 480, 483, 484, 489, 514*

STATUTORY INTERPRETATION: *Construction of statutes – Mandatory or discretionary – Rule 16.11(2) of ACE Market Listing Requirements – 'may de-list' and 'shall de-list' – Whether word 'shall' is employed – Literal and strict interpretation – Adoption of – Whether construed as mandatory – Whether Bursa Malaysia Securities Berhad could not exercise any discretion except to de-list listed corporation upon winding up order*

This was the appellant's appeal against the decision of the High Court allowing the respondent's judicial review application primarily for the following orders (i) a *certiorari* to quash the appellant's listing committee's decision ('LC decision') and appeals committee's decision (AC decision'); and (ii) a *mandamus* order to direct the appellant to issue an announcement that the public reprimand imposed against the respondent by the appellant be nullified and declared invalid. The appellant was the regulator of the Malaysian capital market and maintained, among others, the Main Market and ACE Market. Section 11 of the Capital Markets and Services Act 2007 ('CSMA') empowers the appellant to put in place a comprehensive and effective regulatory and supervisory framework to regulate the market and its participants, among others, through the issuance of the listing requirements ('LR') for various markets including the ACE LR. Wintoni was a public listed company listed on the appellant and was under the supervision of the appellant pursuant to the ACE LR and the CMSA. The respondent was

appointed as liquidator pursuant to a Kuala Lumpur High Court Winding-Up Order. The respondent provided an undertaking to the appellant in the form of a letter of undertaking ('LOU'). Subsequently, the respondent made a general announcement to state, among others, that the respondent would not prepare Wintoni's annual reports that included annual audited financial statements together with the auditors' and directors' reports for the financial year ended ('FYE') and any subsequent financial periods. The appellant conducted an inquiry against Wintoni pertaining to the delay in the announcement of Wintoni's QR 3/2017 and QR 4/2017 and sought explanations for the non-issuance of the same and the arrangements that were being made to do so from the respondent. The respondent responded that it was not his role or function as liquidator and, as Wintoni had ceased operations, he was not in a position to prepare the financial statements *ie,* annual report for FYE 30/6/2016, QR 3/2017 for FYE 30/9/2017, 20 QR 4/2017 for FYE 3/12/2017, QR 1/2018 for FYE 31/3/2018, QR 2/2018 for FYE 30/6/2018. The respondent also stated, among others, that the respondent did not delegate compliance with the ACE LR to the directors and neither did he have any arrangement with the directors, management or any agent. The appellant issued an LC memo to the respondent, giving notice on the proposed enforcement action specifying the nature and particulars of the breach of the ACE LR. After deliberations, the LC's decision were, *inter alia*, (i) Wintoni, as a listed corporation on the ACE Market, had the obligation, pursuant to r. 2.05(2)(a) of the ACE LR to comply with rr. 9.22 and 9.23 of the ACE LR to ensure timely issuance of the financial statements; (ii) the respondent was found to have breached rr. 2.22(3)(a) and (b) of the ACE LR due to Wintoni's failure to announce or issue the financial statements; (iii) s. 480 of the Companies Act 2016 ('CA') imposed a duty on the respondent to observe all requirements imposed on him ' by any written law or otherwise'. The ACE LR was part of the requirements imposed on the respondent and had statutory force; and (iv) the appellant decided to impose a public reprimand on the respondent under r. 16.19(1)(b) of the ACE LR and directed the respondent to make the necessary arrangements to ensure the announcement or issuance of the financial statements. The respondent appealed against the LC's decision, stating, *inter alia* (i) that his duties were limited to those under s. 514 of the CA; (ii) the respondent could not be expected by the appellant to continue making quarterly announcements when Wintoni had ceased operations; and (iii) that the appellant ought to have de-listed Wintoni as it had been wound up. The appellant conveyed the AC's decision which upheld the LC's decision to the respondent, which were, *inter alia* (i) it was not mandatory for the appellant to de-list Wintoni upon the winding-up order being made which was in accordance with the appellant's statutory duties under s. 11 of the CMSA and r. 2.07(2) of the ACE LR and (ii) as the appellant was entitled to and empowered to maintain Wintoni's listing status, the respondent, as the controlling person of Wintoni and having provided the appellant with the LOU, was bound to comply with the ACE LR as long as Wintoni remained

on the appellant's official list and was bound to ensure Wintoni's compliance with the ACE LR. The respondent then commenced judicial review proceedings against the LC's decision and AC's decision. The High Court, in allowing the respondent's application, held that (i) the obligation to prepare the financial statements was not within the duties of a liquidator as prescribed under the CA but instead was that of the directors of Wintoni; (ii) the LOU was in breach of the CA and therefore was void for illegality; and (iii) it was mandatory for the appellant to have de-listed Wintoni upon it being wound up. Hence, this appeal.

Held (dismissing appeal)

Per Lau Bee Lan JCA delivering the judgment of the court:

(1) At the heart of this appeal was the question of the construction to be accorded to r. 16.11(2) ACE LR. There is a difference between r. 16.11(1) and r. 16.11(2) of the ACE LR when seen from the prescribed circumstances where the appellant 'may de-list' and 'shall de-list'. The drafters of the ACE LR clearly distinguished the circumstances where discretion could be exercised when it employed the word 'may' and where the word 'shall' is employed, mandatory requirement for 'de-listing' becomes non-negotiable. Rule 16.11(1) and r. 16.11(2) of the ACE LR which exists in successive fashion clearly, without a doubt, showed the intent of the drafters of the ACE LR. The proper mode of interpretation to be adopted when the word used in the legislation is precise with no tinge of ambiguity at all, is the literal and strict interpretation as opposed to the purposive approach. (paras 8, 14 & 16)

(2) Comparing the positioning of the word 'shall' in r. 16.11(1) and (2) of the ACE LR with s. 158(2) and s. 51A(1) of the Criminal Procedure Code ('CPC'), the intention of the Legislature is crystal clear. The literal and strict interpretation is to be adopted and not the liberal interpretation, whereby the word 'shall' in r. 16.11 (2) of the ACE LR is to be construed as mandatory. In light of the interpretation accorded to r. 16.11(2) of the ACE LR, in that, the appellant could not exercise any discretion except to de-list Wintoni, a listed corporation upon a winding up order being made, it would be irrational, unreasonable and an act of illegality on the part of the appellant to argue that it could exercise its power under r. 2.07(2) of the ACE LR to waive a mandatory requirement of the listing requirements to extricate itself out of the bind. (paras 18 & 19)

(3) The argument of the appellant that the exercise of discretion not to de-list Wintoni was to act in the public interest for the protection of investors consistent with s. 11 of the CMSA ran foul of the mandatory requirement in that the appellant was devoid of any discretion but had to de-list Wintoni, a listed corporation, in conformity with r. 16.11(2) of the ACE LR, whereupon the assets of the company in liquidation

were vested to the respondent for settlement of the creditors. This would be consistent with the legal regime under the CA that upon the winding-up of a company, the power of a director ceases to operate because a liquidator is appointed by the court pursuant to s. 477 of the CA; the liquidator takes custody of the assets of the company in liquidation pursuant to s. 483; directors are required to provide the liquidator with particulars of the company's assets, debts and liabilities under s. 484; and under s. 489 of the same Act, as soon as practicable after the making of the winding-up order, the liquidator 'shall' take charge of the assets and sell them off to pay the creditors and any surplus after payments will be distributed to contributories (shareholders). (para 20)

(4) By the LOU, the respondent, in consideration of the appellant allowing the continued listing of Wintoni, undertook and agreed to comply with the ACE LR. However, it was not a blanket, unqualified and unconditional undertaking; on the contrary, the compliance of the undertaking by the respondent of the ACE LR, inclusive of any amendment, in unequivocal terms was qualified by the words 'in so far as the same apply to me.' Pursuant to s. 480 of the CA, the respondent had to observe the requirements imposed on him as liquidator by any written law which would include the CMSA and the ACE LR. However, it was mandatory for the appellant to immediately de-list Wintoni from the official list upon the winding-up order being granted under r. 16.11(2) of the ACE LR. (paras 24 & 25)

(5) Given this court's finding on the mandatory requirement to de-list Wintoni, it necessarily followed that (i) there was no duty imposed on the respondent to ensure Wintoni's compliance of timely issuance of the financial statements pursuant to r. 2.05(2)(a) of the ACE LR to comply with rr. 9.22 and 9.23 of the ACE LR as it was the LC's decision that these obligations only remained in place as long as Wintoni remained listed; and (ii) neither could it be said that the respondent had breached r. 2.22(3)(a) and (b) of the ACE LR due to Wintoni's failure to announce or issue the financial statements as the LC found and upheld by the AC because the respondent had provided the LOU to the appellant in his capacity as a controlling person pursuant to r. 2.22 of the ACE LR. The LC's decision and the AC's decision were tainted with illegality (the decision maker must understand correctly the law that regulates his decision making power and give effect to it), error of law (misconstrues the terms of any relevant statute, acting in excess of statutory authority) and irrationality (*Wednesbury* unreasonableness) such that the said decisions were amenable to judicial review. (paras 25 & 27)

Case(s) referred to:

Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Benjamin William Hawkes v. PP [2020] 8 CLJ 267 FC ***(refd)***

Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v. Soo Lina & Ors [2018] 6 CLJ 285 CA ***(refd)***

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***

Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC ***(refd)***

Ho Kean Pin v. Malayan Banking Bhd & Ors [2020] 1 LNS 1107 HC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd [2011] 7 CLJ 215 HC ***(refd)***

Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd & Other Appeals [2012] 3 CLJ 837 CA ***(refd)***

Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal [2012] 8 CLJ 678 CA ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Capital Markets and Services Act 2007, ss. 11, 354(2)(j)
Companies Act 2016, ss. 477, 480, 483, 484, 489, 514
Criminal Procedure Code, ss. 51A(1), 158(2)

For the appellant - Preetha Pillai, Nimalan Devaraja & Tiang Wen En; M/s Skrine
For the respondent - Mohd Faizal Khalid & Afifah Afif Azman; M/s Sabri Ahmad & Co

[Editor's note: For the High Court judgment, please see Mohd Afrizan Husain lwn. Bursa Malaysia Securities Berhad [2020] 1 LNS 610 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan JCA:

Introduction

[1] This is an appeal from the appellant against the decision of the High Court dated 15 June 2020 allowing the respondent's judicial review application primarily for the following orders:

(i) a *certiorari* order to quash the appellant's listing committee's decision dated 18 December 2018 ('LC decision') and appeals committee's decision dated 6 May 2019 ('AC decision'); and

(ii) a *mandamus* order to direct the appellant to issue an announcement that the public reprimand imposed against the respondent by the appellant be nullified and declared invalid within 14 days from the date of the court's order. This order was upheld by the AC.

[2] Having considered the respective parties' written submissions and the oral arguments and the relevant records of appeal, we had dismissed the appeal with costs. These are our reasons in respect of the said decision.

Background Facts

[3] The facts relevant to this appeal are as follows:

(i) The appellant is the regulator of the Malaysian capital market and maintains, among others, the Main Market and ACE Market. Section 11 of the Capital Markets and Services Act 2007 (Act 671) ('CMSA) empowers the appellant to put in place a comprehensive and effective regulatory and supervisory framework to regulate the market and its participants, among others, through the issuance of the listing requirements ('LR') for various markets including the ACE LR.

(ii) Section 354(2)(j), CMSA provides for persons to whom the LR apply to comply with and observe the same. Paragraph 2.05, ACE LR provides that (i) a listed issuer by virtue of its admission to the official list is bound by the ACE LR; and (ii) a listed issuer, its directors, officers, advisers, a controlling person (as defined under the ACE LR) which includes a liquidator and any other person to whom the ACE LR is directed must comply with the ACE LR for so long as the listed issuer or its securities remain listed on the official list, even during the period when the listed issuer's securities are suspended from trading.

(iii) Para 2.04, ACE LR sets out the principles upon which the ACE LR are based, which includes the requirement that investors and the public will be kept fully informed by the listed issuers of all facts or information that might affect their interests and in particular, full, accurate and timely disclosure will be made of any information which may reasonably be expected to have a material effect on the price, value or market activity in the securities of listed issuers.

(iv) It is settled law that the LR issued pursuant to the CMSA "has statutory force in the form of rules containing obligations and requiring compliance by participating organisations pursuant to the (CMSA)" as held by this court in *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd & Other Appeals* [2012] 3 CLJ 837; [2012] 6 MLJ 182. (See also *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal* [2012] 8 CLJ 678; [2013] 1 MLJ 158).

(v) Wintoni is a public listed company listed on the appellant and was under the supervision of the appellant pursuant to the ACE LR and the CMSA as alluded to above.

(vi) The respondent was appointed as liquidator pursuant to a Kuala Lumpur High Court Winding-Up Order dated 17 August 2017. Proceedings were commenced shortly thereafter to challenge the winding-up order.

(vii) On 20 September 2017, the respondent provided an undertaking to the appellant in the form of a letter of undertaking ('LOU') bearing the same date with the following contents:

> Compliance with ACE Market Listing Requirements
>
> # I ~~We~~, Mohd Afizan Bin Husain I/C No. 670821-03-5159, am a Liquidator of Wintoni Group Berhad (In Liquidation) ("Company") which # has/~~have~~ been admitted to and is currently listed on the Official List of Bursa Malaysia Securities Berhad ("Bursa Securities").
>
> **In consideration of Bursa Securities allowing the continued listing of the Company on the Official List, # I ~~we~~, UNDERTAKE AND AGREE to comply** with Bursa Securities ACE Market Listing Requirements, including any amendment as may be made from time to time, **in so far as the same apply to # me/~~us~~.**
>
> (emphasis added)

There is a dispute between the parties as to the purpose of the LOU which we shall address later.

(viii) On 31 October 2007 the respondent made a general announcement to state, among others, that the respondent would not prepare Wintoni's annual reports that include annual audited financial statements together with the auditors' and directors' reports for the financial year end ('FYE') ended 31 December 2016 and any subsequent financial periods.

(ix) On 13 March 2018, the appellant conducted an inquiry against Wintoni pertaining to the delay in the announcement of Wintoni's QR 3/2017 and QR 4/2017 which were due on 30 November 2017 and 28 February 2018 respectively and sought explanations for the non-issuance of the same and the arrangements that were being made to do so from the respondent.

(x) On 15 March 2018, the respondent responded that it was not his role or function as liquidator and as Wintoni has ceased operations, he was not in a position to prepare the financial statements ie, annual report

for FYE 30/6/2016, QR 3/2017 for FYE 30/9/2017, QR 4/2017 for FYE 3/12/2017, QR 1/2018 for FYE 31/3/2018, QR 2/2018 for FYE 30/6/2018.

(xi) On 20 March 2018, the appellant requested information whether he had delegated the function of preparing the financial statements to the directors of Wintoni.

(xii) On 21 March 2018, the respondent responded to the appellant stating, among others, that the respondent did not delegate compliance with the ACE LR to the directors and neither did he have any arrangement with the directors, management or any agent.

(xiii) On 10 October 2018, the appellant issued an LC memo to the respondent, giving notice on the proposed enforcement action, specifying the nature and particulars of the breach of the ACE LR.

(xiv) *Via* a letter dated 9 November 2018 the respondent responded to the appellant's notice by reiterating his representations set out in his emails on 15 March 2018 and 21 March 2018 alluded above.

(xv) After deliberation, on 18 December 2021, the LC's decision was communicated by the appellant to the respondent which is summarised in the appellant's submission as follows:

(a) Wintoni, as a listed corporation on the ACE Market has the obligation, pursuant to r. 2.05(2)(a), ACE LR to comply with rr. 9.22 and 9.23, ACE LR to ensure timely issuance of the financial statements. These obligations remain in place as long as Wintoni remains listed;

(b) the respondent was found to have breached r. 2.22(3)(a) and (b), ACE LR due to Wintoni's failure to announce or issue the financial statements. The power to run and manage Wintoni was vested with the respondent upon his appointment as liquidator. The respondent had provided the LOU to the appellant in his capacity as a controlling person pursuant to r. 2.22, ACE LR;

(c) section 480 of the Companies Act 2016 (Act 777) ("the Companies Act") imposes a duty on the respondent to observe all requirements imposed on him by "any written law or otherwise." The ACE LR is part of the requirements imposed on the respondent and has statutory force;

(d) the appellant decided to impose a public reprimand on the respondent under r. 16.19(1)(b), ACE LR and directed the respondent to make the necessary arrangements to ensure the announcement or issuance of the financial statements; and

(e) the respondent was advised that any appeal ought to be made by 28 December 2020.

(xvi) The respondent appealed against the LC's decision in an email dated 12 January 2019 stating therein the following:

(a) that his duties are limited to those under s. 514, Companies Act: to prepare for the statement of receipts and payments of Wintoni for the period of six months from the date of his appointment as liquidator and of every subsequent period of six months. The respondent cannot be expected by the appellant to prepare quarter financial statements for purpose of announcement to Bursa Malaysia;

(b) his withdrawal of the LOU stating that it was signed for the respondent to obtain the user ID so that the announcement of Wintoni's winding-up status could be made;

(c) the respondent cannot be expected by the appellant to continue making quarterly announcements when Wintoni had ceased operations;

(d) that the appellant ought to have de-listed Wintoni as it had been wound-up; and

(e) that the respondent would be applying to the winding-up court for directions.

(xvii) On 6 May 2019, the appellant conveyed the AC's decision which upheld the LC's decision to the respondent. In its decision, the AC stated, among others, the following as summarised in the appellant's submission:

(a) it was not mandatory for the appellant to de-list Wintoni upon the winding-up order being made which is in accordance with the appellant's statutory duties under s. 11, CMSA and r. 2.07(2), ACE LR;

(b) notwithstanding the winding-up order, the appellant had the power and discretion not to de-list Wintoni pending the final disposal of the court proceedings as the latter could potentially negate or suspend the effects of the winding-up order;

(c) as the appellant was entitled to and empowered to maintain Wintoni's listing status, the respondent, as the controlling person of Wintoni and having provided the appellant with the LOU, was bound to comply with the ACE LR as long as Wintoni remained on the appellant's official list and was bound to ensure Wintoni's compliance with the ACE LR.

(d) the respondent, pursuant to s. 480 of the Companies Act, has a duty to observe all the requirements imposed on him as liquidator by any written law or otherwise, including the ACE LR; and

(e) in respect of the attempted withdrawal of the LOU, the respondent's breaches of the ACE LR were committed prior to the revocation or withdrawal of the LOU.

High Court's Decision

[4] On 17 September 2019, the respondent commenced judicial review proceedings against the LC's decision and AC's decision.

[5] On 15 June 2020, the learned High Court Judge allowed the respondent's judicial review application broadly, on the following grounds:

(i) The obligation to prepare the financial statements was not within the duties of a liquidator as prescribed under the Companies Act but instead was that of the directors of Wintoni by relying on the case of the High Court decision of *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd* [2011] 7 CLJ 215; [2012] 7 MLJ 85 at pp. 99 [32], 100[34] and 101[35] which was affirmed by the Court of Appeal in *Tan Sri Dato' Hj Lamin Hj Mohd Yunus v. Bursa Malaysia Securities Bhd* (*supra*) at p. 188[28].

(ii) The LOU was in breach of the Companies Act and therefore was void for illegality.

(iii) It was mandatory for the appellant to have de-listed Wintoni upon it being wound up.

Our Decision

[6] Based on the narrative of the facts above, in essence, it can be seen that the position taken by the respondent is, he is not duty-bound as liquidator to prepare the financial statements as directed by the appellant and that the de-listing of Wintoni upon its winding-up is not an option premised on specific provisions of the Companies Act and the CMSA which we will be adverting to.

[7] The appellant, on the other hand, submitted that at the crux of this appeal is the question of who is responsible, during the period when a winding-up order is in place and a liquidator is appointed, for ensuring the continued compliance of the ACE LR by a listed issuer, including the preparation of financial statements which are prepared not for the appellant's benefit but is a fundamental obligation of listed companies for the benefit of the public investor. The appellant argued that to this question, the CMSA and the Companies Act are not inconsistent with each other and should be read concordant with each other.

Is De-listing Mandatory Under Rule 16.11(2), ACE LR

[8] At the heart of this appeal is the question of the construction to be accorded to r. 16.11(2), ACE LR. This brings us to spot on to a determination of the grounds of appeal 26 to 31 of the memorandum of appeal of the appellant against the learned judge's finding that it was mandatory for the appellant to have de-listed Wintoni upon the making of the winding-up order.

[9] For ease of comprehension, it is necessary to reproduce *in extenso* r. 16.11 ACE LR which reads as follows:

> **16.11 De-listing by the Exchange**
>
> (1) The **Exchange may at any time de-listed corporation** or listed securities **from the Official List in any of the following circumstances**:
>
> (a) where the listed corporation fails to comply with these Requirements, subject to consultation with the SC;
>
> (b) in other circumstances as provided under Rules 8.03, 8.03A, 8.04, 8.05, 9.28 and paragraph 2.0 of Guidance Note 20, upon which the Exchange will notify the SC of the same;
>
> [Cross reference: Guidance Note 20]
>
> (c) upon the de-listing of the listed corporation or the de-listing of such securities on another stock exchange;
>
> (d) in circumstances provided under Rule 4.19(5), subject to consultation with the SC; or
>
> (e) where in the opinion of the Exchange, circumstances exist which do not warrant the continued listing of a listed corporation or any class of its listed securities, subject to consultation with the SC where applicable.
>
> (2) **The Exchange shall de-list a listed corporation in any one of the following circumstances**:
>
> (a) pursuant to a directive, requirement or condition imposed by the SC, after which the Exchange will notify the SC of the decision to de-list;
>
> (b) upon the maturity or expiry of a class or securities;
>
> (c) upon the commencement of a voluntary winding-up of a listed corporation in accordance with the Companies Act; or
>
> **(d) upon a winding-up order being made against a listed corporation**.
>
> (3) For the purpose of sub-Rule 1(a) above, failure to comply with these Requirements will exclude failure to comply with Rules 8.03, 8.04, 8.05 and 9.28.
>
> [Cross reference: Guidance Notes 2 and 3]
>
> (emphasis added)

[10] The learned judge found that it was mandatory for the appellant, pursuant to r. 16.11(2), ACE LR, to immediately de-list Wintoni upon it being wound up as is reflected in His Lordship's findings as follows:

> [42] Berhubung isu ini juga, adalah penting untuk syarikat yang telah dikeluarkan perintah penggulungan seperti Wintoni untuk dibatalkan dari penyenaraian bagi melindungi pelabur dan bakal pelabur. Justeru itu perkataan 'shall' di bawah Peraturan 16.11(2) tersebut hendaklah bersifat mandatori.
>
> [43] Di sini, tindakan responden yang tidak mematuhi Peraturan 16.11(2) tetap mengambil tindakan terhadap pemohon kerana tidak menyediakan 'Penyata Kewangan Tertunggak' saya dapati, adalah suatu tindakan yang tidak munasabah.

[11] Counsel for the appellant submitted that the learned judge had erred by placing undue emphasis on the word "shall" appearing in r. 16.11(2), ACE LR arguing that a strict interpretation of the said rule would mean that the appellant has no option but to de-list Wintoni despite the fact there was ongoing challenge against the winding-up order which may later be set aside which would have caused serious inconvenience or injustice and prejudice to Wintoni and to the public investor as Wintoni would then have lost its listing status without reason. To bolster its contention that the word "shall" in a legal provision does not necessarily connote that it is mandatory but rather, the construction therein depends on the intention of Legislature, the facts and circumstances of the case and the injustice which will be brought if interpreted in a mandatory manner, counsel for the appellant relied on the following two apex court authorities of:

(i) *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360 where Syed Agil Barakbah SCJ (as he then was) (delivering the judgment of the Supreme Court) at p. 362 (MLJ) held as follows:

> [n]o hard and fast rule can be laid down because it depends on the facts circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other.

(ii) *Benjamin William Hawkes v. PP* [2020] 8 CLJ 267; [2020] 5 MLJ 417 at paras. 43 to 49 of the report, where among others, it is observed the Federal Court referred to other Federal Court authorities, including *Hee Nyuk Fook* (*supra*) and p. 285 (CLJ); at p. 417 (MLJ) [49], opined "It is clearly untenable in this case to allude to the word "shall" as mandatory, thus stultifying the justice of the case, when a document was not delivered to the accused persons before the commencement of the trial."

(iii) *Ho Kean Pin v. Malayan Banking Berhad & Ors* [2020] 1 LNS 1107; [2020] MLJU 1435 at para. 23 where the High Court followed the principle in the superior court authority of *Hee Nyuk Fook*.

[12] Counsel for the appellant further submitted that r. 16.11(2), ACE LR must be read in conjunction with r. 2.07(2), ACE LR which reads as follows:

> 2.07 Waivers and modifications
>
> (1) The Exchange requires strict compliance with these Requirements.
>
> (2) Notwithstanding sub-Rule (1) above, the Exchange may at any time, waive or modify compliance with a Requirement or any part of a Requirement. If the Exchange waives or modifies compliance with a Requirement or part of a Requirement subject to a condition, the condition must be complied with or the waiver or modification of compliance to be effective.

Counsel argued that r. 2.07(2) empowers the appellant to modify and/or waive compliance of r. 16.11(2), ACE LR.

[13] Further, counsel for the appellant submitted that the exercise of discretion by the appellant not to de-list Wintoni upon the winding-up order is consistent with the appellant's statutory duties under s. 11, CMSA to act in the public interest for the protection of investors as spelled out here:

> **Duties of exchange**
>
> 11. (1) For the purposes of this section, sections 12, 13 and 27
>
> (a) "exchange" refers to a stock exchange or a derivatives exchange; and
>
> (b) "relevant person" means a participating organization or an affiliate.
>
> (2) It shall be the duty of an exchange to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities or derivatives that are traded through its facilities.
>
> (3) In performing its duty under subsection (2), the exchange shall:
>
> (a) **act in the public interest having particular regard to the need for the protection of investors**; and
>
> (b) ensure that where any interests that is required to serve under any law relating to corporations conflict with the interest referred to in paragraph (a), the latter shall prevail.
>
> (emphasis added)

[14] With respect, we are unable to agree with the above submission of the appellant as we find the arguments are flawed on the facts and circumstances of this case. Instead, we find there is merit in the submission of counsel for the respondent in stating that:

(i) there is a difference between r. 16.11(1) and r. 16.11(2), ACE LR when seen from the prescribed circumstances where the appellant "may de-list" and "shall de-list" as specified respectively in para. 9 above;

(ii) the drafters of the ACE LR clearly distinguish the circumstances where discretion can be exercised when it employs the word "may" and where the word "shall" is employed, mandatory requirement for "de-listing" becomes non-negotiable;

(iii) rule 16.11(1) and r. 16.11(2), ACE LR exist in successive fashion clearly without a doubt shows the intent of the drafters of the ACE LR.

[15] We can do no better than to replicate the following table drawn by the respondent as shown below to demonstrate the clear intent of Legislature on the distinction to be drawn between r. 16.11(1) and r. 16.11(2), ACE LR as adverted in para. 14(i) above:

> 7. Merujuk kepada Peraturan 16.11 LR pada Sub-Para (1) berbanding dengan Sub-Para (2) menunjukkan perbezaan yang mana niat "legislature" adalah tepat dan jelas:

	Sub-Para 1	Sub-Para 2
Perkataan	The Exchange may at any time de-list	The Exchange shall de-list
Keadaan-Keadaan	Terdapat peruntukan 5 peristiwa di mana budibicara dibenarkan samaada syarikat tersebut wajar disingkirkan penyenaraian	Terdapat peruntukan 5 peristiwa mewajibkan Perayu menyebabkan penyingkiran syarikat daripada penyenaraian

[16] The proper mode of interpretation to be adopted when the word used in the legislation is precise with no tinge of ambiguity at all, in our judgment, is the literal and strict interpretation as opposed to the purposive approach as enunciated by the Federal Court in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] 2 MLJ 1 at pp. 203 (CLJ); pp. 21 to 22 [33] (MLJ) as follows:

> [99] In the process of discovering the true intention of the Legislature, the court is also duty-bound to adopt an approach promoting the purpose or object underlying that particular statute. It is a well-established principle that the purposive approach to the interpretation of legislation only applies where doubt arises from the terms or words employed by the legislation. Where the words used are precise and unambiguous, then the literal and strict construction or plain meaning rule will apply.

[17] In so far as the authorities relied on by the counsel for the appellant on the construction of whether the word "shall" in a provision is to be construed as mandatory or directory, as pointed out by counsel for the respondent, they can be distinguished in that none of the cases, unlike the legal provision before us which involved two subparagraphs (sub-para 1 and sub-para 2), one following the other, critically qualified by the prescribed circumstances of when de-listing is an act of discretion (sub-para 1) and when

it is otherwise (sub-para 2) within one legal provision (r. 16.11, ACE LR). As night follows day, one provision stands in stark contrast with the other, as they are vividly presented in para. 15 above. For clarity, as to the difference in the intention of the legal draftsman, in *Hee Nyuk Fook*, the Supreme Court was confronted with the interpretation of the word "shall" in s. 158(2), CPC which reads:

> Section 158 states:
>
> (1) Any court may alter or add to any charge at any time before judgment is pronounced or in the case of trials by jury or trials with the aid of assessors before the verdict of the jury is returned or the opinions of the assessors are expressed.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

[18] In *Benjamin William Hawkes* (*supra*), the Federal Court had to determine the effect of the word "shall" in s. 51A(1), CPC as to whether the court was obliged to construe the word as mandatory. The said provision, among others, reads:

> [40] Section 51A of the CPC provides:
>
> (1) The prosecution **shall** before the commencement of the trial deliver to the accused the following documents:
>
> ...
>
> (emphasis added)

Applying the principles of referencing the word "shall" to the scheme of the statute and the context in which it is used and adopting the purposive rule of interpretation, the Federal Court held respectively at pp. 285 & 286 (CLJ); pp. 434 & 436 (MLJ) the following:

> [49] It is clearly untenable in this case to allude to the word "shall" as mandatory, thus stultifying the justice of case, when a document was not delivered to the accused persons before the commencement of the trial.
>
> [55] Hence, a more liberal meaning must be given to the word "shall" in s. 51A of the CPC rather than a rigid interpretation, so as not to curtail the administration of justice in the manner of a case to be carried out.

Comparing the positioning of the word "shall" in r. 16.11(1) and (2), ACE LR with s. 158(2) and s. 51A(1) of the CPC, it is our respectful view that the intention of the Legislature is crystal clear and we reiterate that the literal and strict interpretation is to be adopted and not the liberal interpretation, whereby the word "shall" in r. 16.11(2), ACE LR is to be construed as mandatory and not the liberal interpretation urged upon us by counsel for the respondent that the appellant has the discretion not to de-list Wintoni, notwithstanding the winding-up order.

[19] In light of the interpretation which we have accorded to r. 16.11(2), ACE LR in that the appellant cannot exercise any discretion except to de-list Wintoni, a listed corporation upon a winding-up order being made, we find it would be irrational, unreasonable and an act of illegality on the part of the appellant to argue that it can exercise its power under r. 2.07(2), ACE LR to waive a mandatory requirement of the listing requirements to extricate itself out of the bind.

[20] Further, it is our respectful view that the argument of the appellant that the exercise of discretion not to de-list Wintoni is to act in the public interest for the protection of investors consistent with s. 11 CMSA runs foul of the mandatory requirement in that the appellant is devoid of any discretion but has to de-list Wintoni, a listed corporation, in conformity with the r. 16.11(2), ACE LR, whereupon the assets of the company in liquidation are vested to the respondent for settlement of the creditors. This, in our respectful view would be consistent with the legal regime under the Companies Act that upon the winding-up of a company, the power of a director ceases to operate because a liquidator is appointed by the court pursuant to s. 477 of the Companies Act; the liquidator takes custody of the assets of the company in liquidation pursuant to s. 483; directors are required to provide the liquidator with particulars of the company's assets, debts and liabilities under s. 484; and under s. 489 of the same Act, as soon as practicable after the making of the winding-up order, the liquidator "shall" take charge of the assets and sell them off to pay the creditors and any surplus after payments will be distributed to contributories (shareholders).

[21] Against the backdrop of our explanation, we therefore find there is no error in the learned judge's finding referred in para. 10 above as the finding was arrived at after His Lordship firstly, made a comparison between the provisions of r. 16.11(1) and r. 16.11(2), ACE LR and noted there is a difference in the usage of the word "shall" in r. 16.11(2) "adalah bersifat mandatori" whereas r. 16.11(1), employs the usage of the word "may" where "budi bicara [di]berikan kepada responden."

[22] Secondly, the learned judge reasoned that it would in a manner of speaking illogical except to construe that "[39]... Pengasingan 2 kategori (Peraturan 16.11(1) yang menggunakan "may" dan Peraturan 16.11(2) yang menggunakan "shall") ini jelas menunjukkan penggubal peraturan ini ingin menjadikan perkataan "shall' di bawah Peraturan 16.11(2) sebagai mandatori."

Purpose And Effect Of The LOU

[23] We will now revert to the differing positions held by the appellant and the respondent with respect to the purpose and effect of the LOU. Counsel for the appellant submitted that the respondent (i) had undertaken to comply

with the ACE LR in its entirety, without exception, qualification or condition; (ii) had agreed to the continued listing of Wintoni and had executed the LOU in consideration of the same; (iii) had not requested for Wintoni to be de-listed but had instead assumed the obligations to comply with the ACE LR to ensure that Wintoni remained listed and that it was only after the LC's decision was issued that the respondent reneged on his position; (iv) held the LOU is expressed in an unconditional and unequivocal language that the respondent undertakes to comply with the ACE LR and there was no basis for the learned judge to accept in the face of such clearly expressed terms that the LOU was for the purpose of gaining access to the website; and (v) held the view that the contention that the LOU was to facilitate access to the appellant's website and the learned judge's acceptance of the same is wholly inconsistent with the learned judge's finding that it is mandatory for the appellant to immediately de-list Wintoni upon the winding-up order being granted because access to the appellant's website is premised on Wintoni continuing to be listed.

[24] In our judgment, points (i) to (iv) in para. 23 of the appellant's submission above can be rebutted by carefully scrutinising the contents of the LOU which is spelled out in para. 3(vii) above. It is correct that by the LOU, the respondent, in consideration of the appellant allowing the continued listing of Wintoni, undertakes and agrees to comply with the ACE LR. However, it is not a blanket, unqualified and unconditional undertaking; on the contrary the compliance of the undertaking by the respondent of the ACE LCR, inclusive of any amendment, in unequivocal terms is qualified by the words "in so far as the same apply to me."

[25] We have no issue with the AC's decision that pursuant to s. 480 of the Companies Act, the respondent has to observe the requirements imposed on him as liquidator by any written law which would include the CMSA and the ACE LR. However, for the reasons we have stated, in our judgment, it is mandatory for the appellant to immediately de-list Wintoni from the official list upon the winding-up order being granted under r. 16.11(2), ACE LR. Given our finding on the mandatory requirement to de-list Wintoni, it necessarily follows that (i) there is no duty imposed on the respondent to ensure Wintoni's compliance of timely issuance of the financial statements pursuant to r. 2.05(2)(a), ACE LR to comply with rr. 9.22 and 9.23, ACE LR as it was the LC's decision that these obligations only remain in place as long as Wintoni remains listed; and (ii) neither can it be said that the respondent has breached r. 2.22(3)(a) and (b), ACE LR due to Wintoni's failure to announce or issue the financial statements as the LC found and upheld by the AC because the respondent had provided the LOU to the appellant in his capacity as a controlling person pursuant to r. 2.22, ACE LR.

[26] Further, given our finding, in respect of point (v) in para. 23 of the appellant's submission above, with respect, we were unable to agree with the learned judge only to the extent that the LOU was for the purpose of gaining access to the website. Here, the trite principle of contemporaneity of documents as submitted by counsel for the appellant is preferred as enunciated in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 (FC); *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob* & Ors [2000] 4 CLJ 324 (CA).

[27] We find purely on the grounds of appeal deliberated above, it is sufficient to dispose of the appeal. We agreed with the finding of the learned judge that the LC's decision and the AC's decision are tainted with illegality ("the decision maker must understand correctly the law that regulates his decision making power and give effect to it"), error of law ("misconstrues the terms of any relevant statute", acting in excess of statutory authority) and irrationality (*Wednesbury* unreasonableness) such that the said decisions are amenable to judicial review and accordingly, the learned judge correctly allowed the judicial review application. In doing so, the learned judge acted in accordance with the established legal principles governing judicial review applications laid in the Federal Court cases of *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 2 MLJ 537, *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 and *Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v. Soo Lina & Ors* [2018] 6 CLJ 285; [2018] 2 MLJ 738 (CA) at 754 [39] and [41].

Conclusion

[28] For all the foregoing reasons, we are of the considered view that there are no merits in the appeal which warranted appellate intervention. In the premises, we unanimously dismissed the appeal with costs and affirmed the decision of the High Court dated 15 June 2020.